United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7600

To Be Argued by
Robert J. Sisk

United States Court of Appeals

FOR THE SECOND CIRCUIT

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant

- against -

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK AND
UPON REMAND FROM THE SUPREME COURT OF THE UNITED STATES

BRIEF OF DEFENDANTS-APPELLEES BROADCAST MUSIC, INC., *et al.*

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Answer: Yes (see *infra* at 9 n.6).

2. If such record is inadequate, what is proposed for the further progress of the case?

Answer: Not applicable (see *infra* at 9 n.6).

3. If the record is adequate, whether the district court correctly held, on the basis of findings of fact affirmed by this Court on CBS' prior appeal, that the offering by BMI to CBS of the alternative of a blanket license is neither an unreasonable restraint of trade under the rule of reason nor a misuse of copyright?

Answer: Yes (see *infra* at 8 to 38).

4. If, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP or BMI to issue a blanket license to a television network for a single fee, would it necessarily be illegal to negotiate and issue blanket licenses to individual radio or

* In its Scheduling Order, this Court directed the parties to address five issues. *CBS, Inc.* v. *ASCAP*, No. 75-7600, slip op. at 3609-10 (2d Cir. July 6, 1979) ("Scheduling Order"). Two of those issues, 1 and 3, appear to be predicated on the assumption that the blanket license is "exclusive," whereas it is, in fact, only one of the alternatives available to the user. See discussion *infra* at 19-20. We here set forth our own statement of issues 1 and 3. Issues 2, 4 and 5 are set forth *in haec verba* from the Scheduling Order. In our view, the only issue the Court need consider is issue 3.

television stations or to other users who perform copyrighted music for profit?

Answer: No (see *infra* at 28 n.19).

5. If, under the rule of reason or copyright misuse, it should be determined that it is an antitrust violation for ASCAP or BMI to issue a blanket license to a television network for a single fee, would it be equally illegal for the members to authorize ASCAP to issue licenses for individual compositions based on prices determined by the copyright owners?

Answer: No (see *infra* at 33 n.24).

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BRIEF OF DEFENDANTS-APPELLEES BROADCAST MUSIC, INC., *et al.*

This brief is submitted by defendants-appellees Broadcast Music, Inc. ("BMI"), *et al.*, upon remand from the Supreme Court of the United States, in opposition to the appeal by plaintiff-appellant Columbia Broadcasting System, Inc. ("CBS") from an order of the United States District Court for the Southern District of New York, Morris E. Lasker, Judge, dismissing CBS' complaint after a full trial on the liability issues.[1]

1. Judge Lasker's opinion is reported at 400 F. Supp. 737 (S.D.N.Y. 1975). The opinion of this Court on CBS' prior appeal is reported at 562 F.2d 130 (2d Cir. 1977). The opinion of the Supreme Court reversing this Court's prior holding and remanding for further proceedings consistent with its opinion is reported at 99 S. Ct. 1551 (1979). These opinions are reprinted in the Joint Addenda To Briefs For Defendants-Appellees submitted herewith.

STATEMENT OF THE CASE[2]

For a decade CBS has achieved through litigation an objective it was denied at the bargaining table—the 1969 license rate for the entire BMI repertory of music.[3] It accomplished this feat without the benefit of any evidence to support its legal theories, which it regularly changed without apparent embarrassment, as its factual contentions were repeatedly refuted.[4]

CBS seeks to prolong and confirm this extraordinary result, at the expense of many thousands of writers and publishers, by asking this Court now to apply still other unsupportable legal theories — (a) the concept that the district court's findings of fact, previously affirmed by this Court, can be disregarded since one dissenting Supreme Court justice did not adopt them; and (b) the proposition that the facts do not matter anyway, because BMI and ASCAP must now persuade this Court that "necessity" requires continuation of their established licensing practices instead of purportedly "less restrictive" alternatives.

Both propositions are fallacious. It was CBS, not BMI or ASCAP, which had, and failed to carry, the burden of

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2. Because this case has been before this Court previously, we have omitted from this brief a detailed description of the prior proceedings, the parties, and the facts relating to the music licensing industry involved on this appeal. That information may be found in BMI's brief on CBS' prior appeal at 1-9 and in its Post-Trial Brief (2 JA 370-583 (references to "JA" are to the volumes of the Joint Appendix)) as well as in Judge Lasker's opinion (*e.g.*, 400 F. Supp. at 741-47, 753-56) and in the Supreme Court's opinion (*e.g.*, 99 S. Ct. at 1554-56, 1557-60).

3. In late 1969, BMI rejected CBS' offer to renew its blanket license at the then existing rate and gave notice of its intention to terminate that license. 400 F. Supp. at 753. It was only then, on the eve of termination, that CBS advanced for the first time antitrust objections to BMI's and ASCAP's licensing practices. *Id.* at 753-54. See history of litigation recited at 5-9 of BMI's brief submitted to this Court in opposition to CBS' prior appeal.

4. CBS' legal theories, factual contentions and requests for relief have been subject to frequent change throughout the case. For example, whereas CBS alleged in its complaint that it would be "wholly impracticable" for it to acquire an adequate supply of performance rights directly from copyright owners, its brief on this appeal now asserts that direct licensing is and always has been "feasible." (CBS Brief at 29.)

proof in the district court. And, of course, the lone Stevens dissent cannot vitiate the prior holding of this Court affirming the findings of fact below.

The issue for determination here is not whether "in restrospect, lawyers can . . . 'conjure up some method of achieving the business purpose in question that would result in a somewhat lesser restriction of trade,' " which this Court has noted could be done in every case.[5] The issue now for determination is quite narrow: whether CBS can establish that the district court erred, *as a matter of law*, in concluding, on the basis of factual findings affirmed by this Court, that the offering of television network blanket licenses does not unreasonably restrain trade and does not constitute a misuse of copyrights.

Set forth below are some of the relevant findings of fact of the district court which dispositively demonstrate that CBS has failed to prove either a rule of reason violation or a misuse of copyrights:

> —"CBS has failed to prove the factual predicate of its claims—the non-availability of alternatives to the blanket license," 400 F. Supp. at 780-81;
>
> —"CBS has failed to prove that there are significant mechanical obstacles to direct licensing," *id.* at 779;
>
> —CBS "has [not] . . . established by credible evidence that copyright owners would refuse to deal directly with CBS if it called upon them to do so. To the contrary, there is impressive proof that copyright proprietors would wait at CBS' door if it announced plans to drop its blanket license," *id.*;
>
> —"CBS has failed to prove copyright proprietors would not compete with one another on a price

5. *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir.), *petition for cert. filed*, 48 U.S.L.W. 3174 (Sept. 19, 1979) (No. 79-427), *quoting American Motor Inns, Inc.* v. *Holiday Inns Inc.*, 521 F.2d 1230, 1249 (3d Cir. 1975).

basis if CBS sought direct licenses from them," *id.* at 781;

—"CBS has not established that the individual defendants are unwilling to sell performance rights on a direct licensing basis at a negotiated price for each license," *id.*;

—"CBS has failed to prove that the licensing authority of ASCAP and BMI is limited to [terms that foreclose CBS from dealing directly with copyright owners] or that copyright owners have refused or would refuse to deal with CBS directly on an individual basis," *id.* at 782;

—"CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. . . . [C]ertainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place," *id.* at 783;

—"The claim that ASCAP members and BMI affiliates are guilty of copyright misuse must be dismissed because CBS has failed to establish that members or affiliates of ASCAP or BMI have refused or would refuse to license their compositions on a direct licensing basis, or otherwise used their collective leverage to compel CBS to license rights to music which it did not wish to license;" *id.* at 782.

On its first appeal to this Court, CBS sought to establish that the above findings of the district court — including its central finding that direct licensing is readily available to CBS — were clearly erroneous. This Court rejected those contentions and expressly adopted all of the district court's findings. Among other things, this Court ruled:

> "Suffice it to say that our review leads us to the conclusion that the essential finding of the District Court that such a [direct licensing] market *can* exist is not clearly erroneous."

* * * *

> "[C]BS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP [and BMI] blanket license[s]. The District Court, as noted, rejected this contention and its findings are not clearly erroneous."

562 F.2d at 135, 141 n.29 (emphasis in original; footnote omitted).

Before the Supreme Court, CBS continued its effort to challenge the district court's findings that there are no "barriers" to direct licensing. However, the Supreme Court refused to disturb those findings which it construed as follows:

> "[T]he District Court found, and in this respect the Court of Appeals agreed, that there are *no* practical impediments preventing direct dealing by the television networks, if they so desire."
>
> * * * *
>
> "The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket license to mask price fixing in such other markets.... The District Court found that *there was no legal, practical, or conspiratorial impediment to CBS obtaining individual licenses; CBS, in short, had a real choice.*"

99 S. Ct. at 1558, 1564 (emphasis added; footnotes omitted).

The continued efforts of CBS to eliminate blanket licensing in the face of these findings—rather than to even try the direct licensing alternative which it says it wants and which three courts have found clearly to be available—reflect the unfortunate economics of litigation during a double-digit inflationary period. It is less expensive for CBS to carry on this litigation and continue payments for the BMI repertory at a 1969 bargain rate than to adopt any other course of conduct.

Fairness calls for prompt disposition of this ten-year old litigation. The time has long passed for hypothetical analyses and ingenious theoretical schemes for refashioning the music world. This case was tried and decided fairly on the evidence and has been remanded solely to deal with "any unresolved" issues which "CBS may have properly brought" to this Court. 99 S. Ct. at 1565. BMI submits that on the facts found below it is clear, as a matter of law, that appellees did not violate the antitrust laws or the policy of the copyright laws.

SUMMARY OF ARGUMENT

The order dismissing CBS' complaint should be affirmed because CBS failed to prove a restraint of trade under the rule of reason and failed to prove copyright misuse. Evaluating the blanket license under the standard articulated by the Supreme Court in 60 years of rule of reason cases, the district court correctly concluded, on the basis of factual findings no longer subject to challenge by CBS, that due to the free availability of direct licensing, the blanket license does not give rise to anticompetitive effects in the network music licensing market.

The anticompetitive effects alleged by CBS on appeal, as well as its allegations of anticompetitive purpose on the part of BMI and its affiliates, are either unsupported by the record or directly controverted by Judge Lasker's findings. They provide no basis for overturning the district court's rule of reason conclusion.

Since the district court found no anticompetitive effects resulting from blanket licensing, it did not have to reach the question of offsetting pro-competitive justifications — the second level of inquiry under the rule of reason. Nonetheless, the court below made findings as to the pro-competitive effects of the blanket license. These effects were also recognized by the Supreme Court and by the Department of Justice when it negotiated the consent decree governing

BMI's operations. The pro-competitive effects of the blanket licensing alternative are even more evident when compared to the highly anticompetitive relief requested by CBS in this case.

Finally, the district court properly concluded that CBS had failed to prove that BMI's affiliates have misused their copyrights. The doctrine of antitrust-related patent misuse should not be extended to music copyrights. In any event, a misuse finding, which could virtually invalidate all musical copyrights, would be totally inappropriate on the record in this case where BMI's affiliates have done no more than license in the historically accepted manner, freely acquiesced in by CBS for many years, and in accordance with the requirements of the BMI consent decree.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED, ON THE BASIS OF FINDINGS OF FACT AFFIRMED BY THIS COURT, THAT CBS FAILED TO PROVE THAT THE OFFERING OF THE ALTERNATIVE OF THE BLANKET LICENSE UNREASONABLY RESTRAINS TRADE UNDER THE RULE OF REASON.

CBS' latest legal theory on this appeal is that the blanket license is not "necessary" to network music licensing, that there are significantly "less restrictive" forms of license available and, therefore, that the blanket license should be struck down as an antitrust violation. (CBS Brief at 30, 41-42.) Such a wooden and automatic approach to the "discriminating" analysis required under the rule of reason is no more than a *per se* rule in another guise. "In a rule of reason case, the test is not whether the defendant deployed the least restrictive alternative." *American Motor Inns, Inc.* v. *Holiday Inns Inc.*, 521 F.2d 1230, 1248 (3d Cir. 1975); *accord, Berkey Photo, Inc.* v. *Eastman Kodak Co.*, *supra*, 603 F.2d at 303.

Application of the proper test under the rule of reason requires the court to examine "the challenged restraint's impact on competitive conditions." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978).

This inquiry is conducted on two levels. The first level requires proof by the plaintiff that the challenged practice has significant anticompetitive effects in the relevant market. *See, e.g., Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp.*, 549 F.2d 368, 380, 381 (5th Cir. 1977).

In *Chicago Board of Trade* v. *United States*, 246 U.S. 231 (1918), Justice Brandeis articulated the various factors that must be considered in determining whether an alleged restraint has any significant anticompetitive effects:

> "[T]he court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint

> was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts."

Id. at 238.

Where the plaintiff fails to show that the challenged practice has caused any significant anticompetitive effect, the rule of reason inquiry is at an end. *See, e.g., Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp., supra,* 549 F.2d at 381.

The second level of inquiry is reached only if the plaintiff has proven that the challenged practice is a restraint of trade with significant anticompetitive effects. Then it becomes necessary for the court to consider whether the practice has any offsetting pro-competitive effects. *See, e.g., Newburger, Loeb & Co.* v. *Gross,* 563 F.2d 1057, 1082 (2d Cir. 1977), *cert. denied,* 434 U.S. 1035 (1978).

A. The District Court's Conclusion That CBS Failed To Prove That The Blanket License Had Any Anticompetitive Effects Is Fully Supported By The Record And The Case Law.[6]

Applying the principles set forth above, the court below correctly insisted that before any inquiry had to be made into the pro-competitive justifications of the blanket license, CBS had the burden of proving the anticompetitive

6. Issues 1 and 2 formulated by this Court's Scheduling Order ask whether the district court record is sufficient for the Court to decide this appeal and, if not, what the future progress of the case should be. While disagreeing with the Court's characterization of BMI as having "tender[ed] an *exclusive* blanket license to CBS" (emphasis added; *see infra* at 19-20), we agree with CBS that the record here is sufficient to allow the Court to determine whether, as a matter of law, the district court erred in finding that the offering of the alternative of blanket licenses to CBS does not unreasonably restrain trade. A 29-day trial was held which fully explored network music licensing, and CBS was given every opportunity at that trial to meet its burden of proving, on the basis of evidence in the record, that the defendants violated the antitrust laws.

effects it alleged—its inability to license directly at competitive prices. 400 F. Supp. at 747, 749-51. Judge Lasker then found that direct licensing was a feasible alternative, and that CBS had failed to establish that "members and affiliates of ASCAP and BMI have illegally combined to eliminate price competition among themselves . . . [or] to fix the price at which CBS must license performance rights by licensing those rights only in a package . . . ." *Id.* at 781.[7]

Judge Lasker's conclusions are fully supported by the cases which hold that the free availability of an alternate supply of the same (or functionally interchangeable) goods defeats a claim of a restraint of trade under the rule of reason. *E.g., Standard Oil Co. (Indiana)* v. *United States*, 283 U.S. 163, 170-71, 176-79 (1931); *K-91, Inc.* v. *Gershwin Publishing Corp.*, 372 F.2d 1, 4 (9th Cir. 1967), *cert. denied*, 389 U.S. 1045 (1968); *see Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, 585 F.2d 821, 836-39 (7th Cir. 1978), *cert. denied*, 99 S. Ct. 1267 (1979). *See also Kentucky Fried Chicken Corp.* v. *Diversified Packaging Corp., supra*, 549 F.2d at 378, 380; *Cernuto Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 165 (3d Cir. 1979).

In *Standard Oil Co. (Indiana)*, the Supreme Court upheld, under the rule of reason, a patent pool against government charges that the effect of the pool was to maintain or

7. This Court's Scheduling Order raises the question whether the blanket license might constitute "price fixing" unlawful under the rule of reason. Scheduling Order at 3608, 3610. CBS' brief echoes this contention, although it ignores BMI and concentrates exclusively on ASCAP and its members. (*E.g.*, CBS Brief at 2, 5.) This is not surprising since any attempt to force the facts of this case into a "price fixing" model disintegrates entirely when applied to BMI and its affiliates. BMI is not a membership organization of writers and publishers. It is an independent corporation. BMI's writer and publisher affiliates own no stock in BMI, have no role in BMI's operations or management, do not participate in decisions as to how license receipts will be distributed, and are not involved in any manner in negotiations between BMI and music users over the prices to be charged for blanket licenses. *See* 400 F. Supp. at 742. In short, BMI acts as a classic middleman, making its own decisions on how much it will charge its customers and how much it will pay its suppliers.

increase royalty rates, on the ground that each patent owner remained free to issue licenses under its own patents or under the patents of all pool members. 283 U.S. at 170-71, 176-79.

In *K-91*, the Ninth Circuit was presented with an anti-trust attack on the blanket license offered by ASCAP to radio stations, again based on a record devoid of proof of anything beyond the mere existence of ASCAP as a bulk licensor of music. The Court of Appeals held, *inter alia*, that ASCAP did not unreasonably restrain trade because there was no proof of any artificial restrictions on the availability of the direct licensing alternative. 372 F.2d at 4.

In its prior opinion, this Court sought to harmonize the result in *K-91* with its own price fixing ruling, pointing out that the parties in *K-91* had stipulated that the defendant, a local radio broadcaster, would have found it "commercially, practicably and virtually impossible . . . to acquire a separate license for each performance broadcast . . . ." 562 F.2d at 137 (footnote omitted). Although the stipulation was neither cited nor apparently relied on by the Ninth Circuit, this Court singled it out as a basis for agreeing with the *K-91* result, holding, however, that the ability of CBS to obtain direct licenses (as contrasted with the radio station) justified a departure from *K-91*. But if, as *K-91* held, the availability of the direct licensing alternative saves the blanket license where transaction costs may serve to prohibit direct licensing, then *a fortiori* it saves the blanket license in the network context where the direct licensing alternative has been found both to be available and to operate as a real constraint on blanket license prices. *See infra* at 12-15.

In *Ohio-Sealy Mattress Manufacturing Co.* v. *Sealy, Inc.*, the Court of Appeals for the Seventh Circuit (with Judge Moore of this Court sitting by designation) recently considered the legality under the rule of reason of a joint sales

agreement on "national accounts" between Sealy, as licensor of "Sealy" trademarks for bedding products, and various Sealy licensees who manufactured those products. Applying *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344 (1933), the court held lawful the joint sales agreement because it did not constitute the exclusive method by which "national account" sales could be made. Thus, the court found that Sealy's licensees were not foreclosed or restrained from competing independently for such business.

B. Contrary To CBS' Assertions, The Mere Offering By BMI Of The Alternative Of The Blanket License Does Not Give Rise To Any Anticompetitive Effects Or Result From Any Anticompetitive Purpose Of BMI Or Its Affiliates.

In its efforts to overturn the decision below, CBS has chosen to rely on assertions of anticompetitive effect which either were never submitted to the district court or are contrary to the findings made by it and affirmed by this Court. The following contentions of CBS are either wholly unsupported or directly controverted by the record below.

1. *Alleged elimination of price competition.*

CBS contends that the mere existence of the blanket license eliminates price competition among copyright owners. (*See* CBS Brief at 8-9.) The record and the findings of the district court demonstrate that CBS' view is totally divorced from the economic realities of the marketplace.

It is clear from the record below that price competition does, in fact, prevail in the network licensing market because of the constraining effect of direct licensing on the prices that BMI and ASCAP can charge for blanket licenses. Although blanket licenses are now regarded by network users as less expensive than direct licensing, if the

royalty fees and administrative expenses of blanket licensing became higher than the royalty fees and administrative expenses of direct licensing, music users could, and would, elect to license directly. Thus, the availability of direct licensing exerts a significant constraint on the price of blanket licenses. As all the expert economists who testified at trial recognized, this constraint constitutes price competition even though users have not actually gone out and solicited price quotations for direct licenses. (8 JA 1670; 14 JA 3982; 15 JA 4384-85.)

Judge Lasker, after hearing all of the evidence, including testimony by these experts, rejected as "unmeritorious" CBS' contention that "it has established an illegal restraint of trade as a matter of law because the blanket license arrangement has 'thoroughly eliminated' price competition among copyright owners as a matter of historical fact." 400 F. Supp. at 748. And, Judge Lasker specifically found:

> "The claim that members and affiliates of ASCAP and BMI have illegally combined to eliminate price competition among themselves must be dismissed because CBS has failed to prove that copyright proprietors would not compete with one another on a price basis if CBS sought direct licenses from them."

Id. at 781.[8]

In its earlier opinion in this case, this Court stated that its objection to the blanket license was that "it reduces price competition . . . and provides a disinclination to compete." 562 F.2d at 140.[9]

8. Both the district court and this Court rejected CBS' contention that "a blanket licensing system overhanging the [direct licensing] market in any combination of circumstances will necessarily affect the price for each set of individual performing rights." 562 F.2d at 140 n.27.

9. In his opinion voting to deny appellees' petitions for rehearing, Judge Moore apparently disagreed, stating: "Proof should also be developed which will support or disprove the majority's assumption (*thus far unsupported by proof as I see it*) that the blanket license 'reduces price competition among the members and provides a disinclination to compete.'" *CBS, Inc.* v. *ASCAP*, No. 75-7600 (2d Cir. Dec. 6, 1977) (Moore, J., voting to deny petitions for rehearing) (emphasis added) (reprinted as Addendum 3 in Joint Addenda To Briefs For Defendants-Appellees).

This objection was apparently based on the *a priori* assumption that the method by which television network music is to be licensed is a matter of choice for the copyright owner. However, the record shows, and the district court found, that such an assumption is unfounded. The availability of the blanket license gives the power of choice to the user of music, not the music owner. The network determines what music it wants; the selection of music is made by the network or the program producer. 400 F. Supp. at 755-57, 758, 759-60, 762, 770-71, 775, 779. The copyright owner lacks any power to choose, since there is a high degree of interchangeability among songs suitable for network television use, and for any particular song there are a number of suitable alternatives. *Id.* at 751-52, 771, 783. If a copyright owner will not license by the method the network wants, other music will be substituted and his music will not be used. *Id.* at 770-71, 776-77, 778, 779, 783.

Two examples from the trial record vividly illustrate this point. CBS witness Robert Wright testified at trial that he had initially selected the song "Santa Lucia" to set a Venetian scene on "The Carol Burnett Show." However, he discovered that the copyright owner wanted $300 for the synchronization right to "Santa Lucia," which was "perfect," whereas "O Sole Mio" would cost only $50. "So, we, without hestitation, went for 'O Sole Mio.'" (4 JA 430.) Similarly, CBS witness Edward "Duke" Vincent, the producer of "The Jim Nabors Show," testified that he had originally wanted to use "Happy Birthday" which he described as "a very unique song because it's the only one that says exactly that . . . ." (*Id.* at 603.) But since "Happy Birthday" would have cost $500, Vincent decided to use "For He's A Jolly Good Fellow" instead. (*Id.* at 604.)

Plainly, the power to make the music selection gives the network the power to determine the licensing method. So long as a user elects to employ blanket licenses, the copyright owner has no occasion to seek direct sales to that user,

since the user does not want to buy two licenses for the same music. When a user chooses not to take a blanket license, the copyright owner must compete for direct sales to that user if he wants his music used. Literally and figuratively, it is the network which calls the tune. The blanket license is simply not an option that belongs to the copyright owner, and its availability does not affect the user's right or ability to obtain direct licenses.

The trial record contains evidence of only two actual efforts at direct licensing---the 3M experience of the 1960's and the Warner Brothers experience of the 1930's. They demonstrate beyond peradventure the user's absolute power of choice.

In the 1930's, Warner Brothers, a music publisher, had a valuable catalog which included the works of such composers as Cole Porter, Rodgers & Hart, Oscar Hammerstein, Vincent Youmans and Jerome Kern. Warner decided to withdraw the catalog from ASCAP and to try to license broadcasters directly rather than through the ASCAP blanket licenses. The *users*, however, chose to take only ASCAP blanket licenses, and refused to take direct licenses from Warner. They simply played those songs that were still available under their blanket licenses, and Warner Brothers' music was not used. (19 JA D645-55.)

On the other hand, 3M, a user of music, sought direct licenses from publishers; despite the preferences of some of the publishers for dealing through ASCAP, 3M obtained all the music it needed, at bargain prices, through direct licenses. Those publishers who would not license 3M directly did not have their music used. 400 F. Supp. 772 & n.17, 774.

In both of these situations, the copyright owners who did not license in the manner chosen by the user were excluded and did not have their music used. The preferences of the copyright owners, whether for direct licensing or for licensing through a middleman, were quite irrelevant. This

Court's prior assumption that the copyright owner controls the choice of licensing method is thus not supported by the record.

2. *Alleged "economic discrimination."*

Drawing on the Stevens dissent, CBS argues for the first time that, by charging networks on a percentage-of-revenue basis for blanket licenses, defendants are engaged in "economic discrimination," since the three networks pay varying dollar amounts for the same license. (CBS Brief at 10.) CBS' assertion that some kind of anticompetitive effect derives from this fact is foreclosed by the Supreme Court's decision in *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 (1950), and is unsupported by record proof or antitrust theory.[10]

In *Automatic Radio*, the Supreme Court considered the legality of nonexclusive patent licensing agreements which contained provisions requiring payment of royalties based on an identical percentage of sales of various licensees' products, regardless of whether the licensees used any of the licensor's package of patents. *Id.* at 829, 830-34.

The result of the royalty provision at issue in *Automatic Radio* was that different licensees paid different amounts for the same product — the right to use any or all of the patents contained in the pool. Despite this apparent disparity in payment, the Supreme Court upheld the licensing agreement, stating:

> "We cannot say that payment of royalties according to an agreed percentage of the licensee's sales is unreasonable."

Id. at 834.

The majority opinion of the Supreme Court in this case expressly re-affirmed *Automatic Radio* (99 S. Ct. at 1556-57 n.13), which constitutes, at the very least, implicit rejection

10. "Economic discrimination" apparently is a bastardized version of the economic theory of price discrimination, which recognizes that price discrimination is *not* necessarily or inherently anticompetitive. *See* P. Areeda, *Antitrust Analysis* (2d ed. 1974) at 466-67.

of the "economic discrimination" argument proffered by the Stevens dissent.

In any event, a theory of "economic discrimination" cannot be applied to music licensing, since a license to perform music does not represent the identical product to every buyer. The size of the audience to whom a user makes performances is a fundamental characteristic of the performance right conveyed. Thus, the right to perform a song in a tavern is not the same as the right to perform it on a national television network, even though both rights are derived from an identical blanket license. It would be absurd to expect the tavern owner and network to pay the same amounts for their licenses. To the extent the three networks differ in the size of their audiences, they earn different revenues and, accordingly, the fees for their blanket licenses, as is true of other fees in the entertainment world, vary proportionately.[11]

3. *Alleged barriers to direct licensing — the recurring myth.*

Until now, CBS has steadfastly argued that direct licensing does not offer a practical alternative to blanket licensing. This argument was squarely rejected by each court that has considered the question. In view of CBS' tenacity on this issue, it was, therefore, momentarily jarring to find CBS now arguing: "*[A]s three courts have found, direct licensing is a distinctly feasible alternative.*" (CBS Brief at 29; emphasis added.) Paradoxically, but predictably, CBS goes on to argue that its access to a direct licensing market

11. *E.g.*, CBS pays varying amounts to its 200 affiliated television stations for airing the same CBS network programs (20 JA E13-14 (¶2)); similarly, CBS' affiliated stations pay to CBS differing amounts for their share of CBS' blanket licenses (*id.* E18); and movies and television programs are marketed to individual television stations as well as to networks at different prices in proportion to the size of the markets (*see, e.g., Happy Days for Syndicators Of Network Comedies*, Broadcasting, Jan. 10, 1977, at 34-36; "*Sanford*," "*Good Times*" *Off-Network Sales Said To Be At Record Prices, id.*, July 25, 1977, at 84; *Up, Up and Away, id.*, Nov. 7, 1977, at 7 (motion pictures)).

is nonetheless blocked by the same worn-out and discredited "barriers" that it previously complained of before the district court, this Court and the Supreme Court, namely: alleged lack of "machinery" to facilitate direct licensing; alleged hold-ups by copyright owners for music "in-the-can"; and alleged "disinclination" on the part of copyright owners to deal directly with CBS. (*Id.* at 12-17, 43-44.) In order to rehabilitate these relics, CBS now contends that there would be " 'unprecedented costs and risks' " arising from these "barriers" which "inhibit" CBS' management from making a switch to direct licensing. (*Id.* at 43-45.)

The answer to this latest "barriers" contention is that, as three courts have found:

> "[T]here was no legal, practical, or conspiratorial impediment to CBS obtaining individual licenses; CBS, in short, had a real choice."

99 S. Ct. at 1564. This finding is simply not open to further attack by CBS.

Moreover, the alleged "costs and risks" to CBS associated with switching to direct licenses, to the extent that they have any reality, are simply the ordinary business consequences of making a change from a long-established practice of dealing with a middleman to dealing directly with suppliers. These are hardly "antitrust" injuries and "bear no relationship" to the offering of the blanket license. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.") (emphasis in original); *cf. Gough* v. *Rossmoor Corp.*, 585 F.2d 381, 386 (9th Cir. 1978), *cert. denied*, 99 S. Ct. 1280 (1979).

CBS' argument here is no more than a naked plea that this Court construe the antitrust laws in such a manner that CBS will be entitled to relief guaranteeing it a loss-proof switch to direct licensing and protecting it from

becoming competitively disadvantaged vis-a-vis the other networks should its decision to switch turn out to be a bad one. This plea, by " 'the giant of the world in the use of music rights,' " is patently absurd and should be rejected. 99 S. Ct. at 1554.

4. *Alleged "exclusive all-or -nothing" blanket license.*

The claim that CBS is faced with an "exclusive all-or-nothing blanket license policy" is also taken wholesale from Justice Stevens' dissenting opinion (*see* 99 S. Ct. at 1566) and is predicated on the misconception that CBS is unable to obtain music other than through the blanket license.

Under the terms of the amended consent decree entered in *United States* v. *Broadcast Music, Inc.*, [1966] Trade Cas. (CCH) ¶71,941 (S.D.N.Y. 1966) (the "BMI Decree"), BMI is required to offer a per program license as an alternative to the blanket license. *Id.* at 83,326. Presumably because the blanket and per program licenses both allow the user access to the complete BMI repertory, this Court earlier concluded that a per program license is "simply another form of blanket license" (562 F.2d at 133), and Justice Stevens stated that a per program license is "simply a miniblanket license." 99 S. Ct. at 1566 n.8. But the record below will not support the conclusion that the per program license offers the network user nothing different from the blanket license.

Judge Lasker found that a per program license would allow CBS to mix direct and bulk licensing in a way that would enable it closely to approach its claimed goal of paying only on a song-by-song basis. 400 F. Supp. at 778-79.[12] In short, per program licenses, covering music in

12. That such license offers CBS a practical alternative is further evidenced by the fact that the record shows that, for many years, CBS' radio network availed itself of a per program license from BMI. (BMI Exhibit 101.)

those shows for which CBS may not be able to make satisfactory direct licensing arrangements (at most, only a small portion of CBS' programming), offer CBS and any other network user, a distinct and "logical alternative" to the blanket license. *Id.* at 778.

Moreover, in analyzing competitive effects in the network music market, it is myopic to focus only on BMI and ASCAP as sources of supply for music licenses to the exclusion of clearly available alternative sources of supply — the individual copyright owners. Here, Judge Lasker found:

> "Manifestly, ASCAP and BMI are *not* the sole source of the performance rights CBS needs; they are merely the sole source of the blanket licenses which CBS does not want."

Id. at 782 (emphasis added).[13] CBS' proven ability to obtain direct licenses flatly contradicts any notion of anticompetitive effects flowing from an alleged "exclusive" blanket licensing policy.

5. *Alleged anticompetitive intent.*

CBS also seeks to establish the requisite anticompetitive effects of the blanket license by claiming that BMI and ASCAP have offered the blanket license deliberately for the purpose of reducing competition. (*See* CBS Brief at 17-22.)

13. CBS points to BMI's alleged refusal some years ago to grant NBC a license for a limited part of the BMI repertory — presumably as evidence of the "exclusivity" of the blanket license. (CBS Brief at 18.) The facts are: NBC sought a license to approximately 500 of the songs in the BMI repertory, claiming that these songs were improperly tied to the rest of the repertory; BMI moved for, and was granted, a prompt and separate trial on the issue of whether NBC's request had been made in good faith; *on the morning that trial was to begin, NBC elected to take a new blanket license from BMI. Broadcast Music, Inc.* v. *National Broadcasting Co.*, No. 70 Civ. 1785 (S.D.N.Y.). Surely, BMI's action in challenging the bona fides of NBC's demand cannot be transformed into evidence that CBS is without alternatives to the blanket license — especially when NBC elected to take a blanket license rather than test in court the good faith nature of its limited request.

CBS supports this argument primarily by reference to events that occcurred before BMI was founded, litigations to which BMI was not a party and selected quotes from *ASCAP* officers.

The Supreme Court, however, rejected these CBS contentions and found that the blanket license did not evolve out of any purpose or intent by BMI or ASCAP to lessen competition in music licensing. 99 S. Ct. at 1562-63, 1564 & n.39. The Court held:

> "The blanket license, as we see it, is not a 'naked restraint[] of trade with no purpose except stifling of competition,' but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the market place: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, night clubs, and restaurants, and it was in that milieu that the blanket license arose.
>
> "A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public performance rights organized itself largely around the single-fee blanket license, which gave unlimited access to the repertory and reliable protection against

> infringement. When ASCAP's major and user-created competitor, BMI, came on the scene, it also turned to the blanket license."

Id. at 1562-63 (citations omitted).

The contention that the defense of this lawsuit, which demands no damages, establishes an anticompetitive intent (*see, e.g.*, CBS Brief at 22, 25) is specious, for CBS has raised a misuse claim by which it seeks a complete forfeiture of the value of all BMI and ASCAP music used by CBS during the past decade. CBS has also pleaded misuse as a defense to BMI's claims in state court for $4,917,508 in license fees due under the license which was in effect prior to the commencement of this litigation. *Broadcast Music, Inc.* v. *CBS Inc.*, No. 573/1975 (N.Y. Sup. Ct. N.Y. Cty.). And the other music users which CBS mentions have also raised misuse claims during each of their licensing disputes with BMI. *See, e.g.*, Complaint ¶¶ 66-68, *Buffalo Broadcasting Co.* v. *ASCAP*, No. 78 Civ. 5670 (S.D.N.Y., filed Nov. 27, 1978).

CBS has consistently opposed any adjustments to the interim license fee payable to BMI by it. The bargain-rate 1969 license fees CBS has been paying for the last 10 years have had a debilitating effect on BMI's ability to negotiate new licenses with other users and have acted to depress artificially the market for such licenses. The obvious consequence of the depressed market price caused by this litigation is that BMI has been unable to pay its affiliates full value for their creative works. BMI has no choice under such circumstances but to litigate this case to a final conclusion.

BMI has also legitimately opposed CBS' suit and its request for either a per use license or an injunction against the blanket license in order to avoid the imposition of markedly anticompetitive relief (*see infra* at 29-33) and to preserve, for CBS' present and potential competitors, the alternative of the blanket license which every court has recognized to be a desirable and useful method of obtaining music rights.

C. The Alternative Of The Blanket License Offers Significant Pro-competitive Advantages.

The second level of inquiry under the rule of reason (identification of offsetting pro-competitive effects) would be reached only if CBS had actually proven at trial, as opposed to hypothesizing on appeal, that the offering of blanket licenses had a significant anticompetitive impact in the network license market. Since CBS failed in such proof, the district court did not have to reach this issue. Nonetheless, Judge Lasker made findings as to the pro-competitive effects of the blanket license; these effects were also recognized by the majority of the Supreme Court and by the Department of Justice when it negotiated the BMI Decree.

1. *For both the network and the copyright owner, the blanket license is a transactionally efficient method for licensing music.*

Two of the three courts that have considered CBS' claims have affirmatively found that the blanket license, because of its transactional efficiency, flexibility and convenience, affords *network users* significant advantages in the licensing of music.

The district court thus found:

> "An ASCAP blanket license gives the user the right to perform all of the compositions owned by its members as often as the user desires for a stated term, usually a year. Convenience is the prime virtue of the blanket license: it provides comprehensive protection against infringement, that is, access to a large pool of music without the need for the thousands of individual licenses which otherwise would be necessary to perform the copyrighted music used on radio stations and *television networks* in the course of a year. Moreover, it gives the user unlimited flexibility in planning programs, because any music it chooses is 'automatically' covered by the blanket license."

400 F. Supp. at 742 (emphasis added).

This Court in its prior opinion, while not affirmatively so finding, did not disagree:

> "There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those [networks] who wish full protection against infringement or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others."

562 F.2d at 140.

The Supreme Court, on the other hand, pointed out specific ways in which the blanket license offers *network users* cognizable transactional savings:

> "*[F]or television network licenses*, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, of times, and that obviates the need for closely monitoring the networks to see that they do not use more music than they pay for. . . . Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.
>
> * * * *
>
> "*This substantial lowering of costs*, which *is* of course *potentially beneficial to* both sellers and *buyers*, differentiates the blanket license from individual use licenses."

99 S. Ct. 1563 (emphasis added; footnote omitted).[14]

14. CBS acknowledges the transactional efficiencies of blanket licenses to networks, but seeks to denigrate their pro-competitive aspects by declaring, virtually *ex cathedra*: "But those cost savings, as well as obviating the need for additional publisher employees, would be more than offset by the enormous savings achievable if blanket licensing were eliminated." (CBS Brief at 38.) Aside from the specific inapplicability to BMI of many of the alleged costs savings (*e.g.*, litigation under the ASCAP consent decree), the costs identified are totally unsupported by record proof and, at most, are by-products of CBS' uncabined speculation.

The Supreme Court also recognized that the blanket license offers *copyright proprietors* the following pro-competitive advantages:

(1) the blanket license and BMI make available in bulk certain resources and services for sales and copyright enforcement unavailable to individual copyright proprietors (*id.* at 1563);

(2) the blanket license substantially lowers costs which, "is of course potentially beneficial to . . . sellers" (*id.*);

(3) the blanket license minimizes the cost of policing by the copyright owner, which is a necessary concomitant to the rights granted by the Copyright Act (*id.*);[15]

(4) the blanket license leaves composers "with numerous markets and numerous incentives to produce" (*id.* at 1564 n.40); and

(5) "since popular songs get an increased share of ASCAP's revenue distributions," the blanket license allows composers to compete "in terms of productivity and consumer satisfaction" "even within the blanket license" (*id.*).

15. Unlike other property, copyrights must be policed to have any value at all. *See* 562 F.2d at 132. As long as networks hold blanket licenses, they have no incentive to infringe or incorrectly report music usage, not even in a last-minute decision to perform a given copyrighted work. 99 S. Ct. at 1563 & n.36. Without blanket licenses, however, some form of monitoring (to supplement review of log sheets and spot checking) would be necessary to insure that copyright owners were being adequately compensated for use of their works. CBS' contentions (CBS Brief at 37) that copyright owners would not have a legitimate interest in seeking to protect themselves against infringement by CBS in a direct or per use licensing system and that monitoring of CBS would be "superfluous," is fanciful, at best. This Court can take judicial notice that a federal court jury has recently awarded a copyright owner $717,281 in damages against CBS for the latter's wilful infringement of copyrights in a situation where, after being refused permission to broadcast portions of Charlie Chaplin's copyrighted motion pictures, CBS went ahead and broadcast the film clips anyway. *Roy Export Co.* v. *CBS Inc.*, No. 78-2417 (S.D.N.Y.), N.Y. Law Journal, Oct. 17, 1979, at 1, col. 2.

In sum, by aiding the copyright owner, as well as the user, the blanket license effectuates and stimulates "the commerce anticipated by the Copyright Act." *Id.* at 1562.[16]

2. *The Department of Justice and Congress have both recognized that the blanket license has pro-competitive effects.*

The pro-competitive aspects of the blanket license recognized by the court below and the Supreme Court are also reflected in the BMI Decree. The decree was entered in 1966, long after the infancy of the television industry and at a time when the Department of Justice had had over 20 years of experience with the competitive conditions in the network music license market. By virtue of the decree, BMI is required to offer television networks blanket licenses and per program licenses, and to preserve free access of the networks to direct licensing transactions with copyright owners. [1966] Trade Cas. (CCH) at 83,325-26. Significantly, however, the BMI Decree does not require BMI to offer networks a per use license.

The Department of Justice, which has "principal responsibility for enforcing the Sherman Act" (99 S. Ct. at 1559), has taken the position that blanket, per program and direct licenses constitute sufficient options for protection of the competitive and business interests of the networks. *Id.* This is true since, as the Supreme Court held, the BMI

16. The blanket license also lowers barriers to entry into the television industry. The television industry is regarded as one of the most entrenched and concentrated businesses in our economy. This fact is underscored by the government's pending lawsuits against the networks in which it is charged that CBS and ABC (NBC has settled) have used and continue to use their control over access to air time to restrain and monopolize prime-time television programming. *See, e.g., United States* v. *CBS Inc.*, 4 Trade Reg. Rep. (CCH) ¶45,074 at 53,596-97 (C.D. Cal. 1974). To a potential network entrant, such as the satellite-transmitting "super-stations," the blanket license offers a transactional device which might well enable the entrant to compete with the three national networks. The utility of the blanket license to new entrants is a significant indicator that the license has pro-competitive justification. *Cf. Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977) (recognizing that even marketing restrictions may have pro-competitive justification when they permit new entrants to compete in the market).

Decree is a "fact of economic and legal life" in the industry, and "presumably" already reflects the "balancing of economic power[17] and of pro- and anticompetitive effects" — which is the very goal of the rule of reason inquiry. *Id.* at 1559 n.24.[18]

The pro-competitive aspects of the blanket license have also been recognized by Congress and its specially-created agency for dealing with music licensing. Thus, the Copyright Royalty Tribunal has determined with respect to public broadcasters (which operate in similar ways to the three commercial networks) that blanket licensing is "the most suitable method for licensing musical works." 43 Fed. Reg. 25,068, 25,069 (1978). The Tribunal's action in selecting the blanket license as the desired mode of licensing presumably reflected its determination that the blanket license offered the user cost savings and efficiencies in comparison to direct or other forms of licenses.

In addition, in the Copyright Act of 1976, Congress turned to the blanket license when it established compulsory blanket licensing of certain kinds of secondary transmissions by cable television systems. *See* 17 U.S.C. § 111. This was done because Congress believed that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system." H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 89 (1976), *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5659, 5704. Congress also

17. The Supreme Court's references to the importance of preserving the "balancing of economic power" worked out in the BMI Decree (99 S. Ct. at 1559 n.24) and to CBS' economic status—" 'the giant of the world in the use of music rights'; the 'No. 1 outlet in the history of entertainment' " (*id.* at 1554) — are cogent reminders that, in analyzing the blanket license under the antitrust laws, appropriate regard should be given to the enormous bargaining power of the networks in music licensing transactions.

18. The Supreme Court's concern lest "unthinking application of the *per se* rule" upset the balancing of economic power and competitive effects "presumably" achieved by the BMI Decree must apply with equal force to a rule of reason analysis since the goal of the inquiry under both rules is the same. 99 S. Ct. at 1559 n.24.

directed the Copyright Royalty Tribunal to collect compulsory blanket license fees from the operators of jukeboxes and distribute the amounts collected to, among others, BMI and ASCAP. *See* 17 U.S.C. §§ 116(c)(4), (e)(3); 99 S. Ct. at 1560.

* * *

By any measure, the blanket license is a reasonable and efficient transactional arrangement for effectuating the Congressional goal of creating a market in performance rights for music copyrights. *See* 99 S. Ct. at 1562 n.32, *citing Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1962). The fact that the blanket license is a superior method of transacting business in that market and has predominated over less efficient ones is not anticompetitive; it is evidence of competition itself.[19]

19. With respect to Issue 4 in this Court's Scheduling Order, we think it clear, and thus limit our remarks to this footnote, that, if it were determined that the blanket license offered to CBS is an unreasonable restraint of trade or copyright misuse, it would not "necessarily be illegal to negotiate and issue blanket licenses to individual radio or television stations or to other users. . . ." Scheduling Order at 3610. The Supreme Court has already indicated that, with respect to non-network users, including "individual television or radio stations," the "necessity" of a blanket license is "obvious" (99 S. Ct. 1563), and this view is consistent with the view of the Department of Justice and the holding of the Ninth Circuit in *K-91*. In any case, the issue of the legality under the rule of reason of the blanket license vis-a-vis other users would require a "discriminating" analysis of the facts of the particular user's market. Otherwise, the rule of reason approach would be undifferentiated from application of the *per se* rule. *See* 99 S. Ct. at 1559 & n.24.

II. THE RELIEF SOUGHT BY CBS WOULD BE HIGHLY ANTICOMPETITIVE.

A. To Enjoin Blanket Licensing Of Television Networks Necessarily Would Limit Competition.

CBS continues to demand that ASCAP and BMI should be enjoined from licensing television networks on a blanket basis because "the blanket license does not permit any direct licensing." (CBS Brief at 36, 48.) As every court has recognized, however, a market for direct licenses is now available, can function and can function alongside the availability of blanket licenses. 99 S. Ct. at 1564; 562 F.2d at 134, 138; 400 F. Supp. at 765-78, 779-83.

This Court has already held that because of its desirable attributes for network users, the blanket license should not be enjoined. 562 F.2d at 140-41. CBS is thus foreclosed from obtaining any such injunction.[20] But even if an injunction were not foreclosed, it is clear that no injunction should issue since it necessarily would result in highly anticompetitive effects. The admitted goal of the relief sought by CBS is to prevent other networks and potential network entrants from having blanket licenses if CBS elects not to have one.

Executives of CBS testified at deposition that because blanket licenses provide the widest possible latitude for creative programming, the quality of programming at CBS would suffer creatively if it chose to do without a blanket license. (Paley, 19 JA D764-65; Stanton, 19 JA D876-77.) If at the same time, NBC and ABC elected to keep blanket licenses, CBS programs would have a "second-class appearance" and be "bush league compared to NBC and ABC." (Wood, 19 JA D1016-17.) CBS Vice President Sipes testified at trial that NBC and ABC "would like to stay in the blanket license and watch me destroy myself." (3 JA 86.)

20. Even Justice Stevens concluded that the offering of a blanket license to the networks should not be prohibited. 99 S. Ct. 1565, 1566.

CBS' counsel stated that, "given this vast number of compositions that the pool has, given indeed the immediate accessibility of all those compositions, given the programming flexibility which such a license affords, . . . *no competitor [without a BMI or ASCAP license] could allow its competitor to have a license with that pool.* ..." (1 JA 251; emphasis added.)

In the absence of an injunction against blanket licensing, the market would remain free to perform competitively. If CBS undertook to license performance rights directly, and the basic premise of CBS' claims were correct—*i.e.*, direct licensing proved cheaper and more desirable than blanket licensing—NBC and ABC could be expected quickly to abandon their blanket licenses without need for an injunction. On the other hand, if ABC or NBC were to continue to view blanket licensing as the most desirable method of obtaining performance rights—whether because of lower cost, greater programming flexibility, or both—they would be able to retain their blanket licenses.[21]

The true role of the proposed injunction which seeks to "ultimately render ASCAP's licensing role obsolete" (CBS Brief at 36), is at once apparent: it is to limit competition by CBS' current and potential competitors if it turns out that the blanket license is indeed the cheapest, most efficient and most desirable method of licensing performance rights. Acceptance of the CBS proposal *to eliminate competition* provided among the networks by the

21. In their amici briefs, ABC and NBC state, in effect, that they do not want their current blanket licenses and that the blanket license need not be retained in the marketplace for their benefit. (Brief of American Broadcasting Companies, Inc., *Amicus Curiae*, at 3, 5; Brief of National Broadcasting Company, *Amicus Curiae*, at 2-4). Leaving aside the substantial threshold issue posed by the absence of *any* proof in the record to this effect, NBC's and ABC's protestations seem dubious, at best: both networks have continued to take BMI blanket licenses as their preferred method of licensing music since this lawsuit began and since three courts have found that direct licensing is a freely available licensing alternative. In any case, the requested injunction against the blanket license would seem plainly unnecessary since *none* of the networks now claims to want that form of license.

blanket license option would result in an incredible perversion of the purposes of the antitrust laws.

B. The Per Use License Sought By CBS Is Necessarily Anticompetitive.

In its earlier opinion, this Court suggested that BMI and ASCAP could be allowed to continue offering blanket licenses if they were also

> "required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing."

562 F.2d at 140 (footnote omitted). CBS continues to press for a per use license — even claiming that it represents a license "far less restrictive" than blanket licenses (CBS Brief at 36) — despite the Supreme Court's admonition that CBS' per use licensing proposal "might be even more susceptible to the *per se* rule than blanket licensing." 99 S. Ct. at 1561 n.27.

The trial record demonstrates the wisdom of the Supreme Court's remarks. As originally concocted,[22] the per use license sought by CBS would include the following elements: (1) standard rates (*i.e.*, a form of "list price") would be charged by ASCAP and BMI for each type of use; (2) CBS would have the choice of licensing a particular

22. On appeal, CBS has consistently sought to obscure the more restrictive and anticompetitive aspects of the per use licensing scheme which it demanded below. *Compare* 400 F. Supp. at 747 n.7 *with* CBS Brief at 23, 35-36. For example, it no longer mentions that the "right of withdrawal" (see *infra* at 32 n.23) would not extend to spontaneous or other unplanned uses. Moreover, CBS now suggests that the "list prices" in its per use system might be set "independently by each music publishing corporation," rather than by BMI and ASCAP as originally proposed. (CBS Brief at 36.) Obviously, in evaluating the correctness of the district court's conclusion that the blanket license is not illegal, this Court's consideration of other purported alternatives must be limited to those alternatives as they were actually presented to the district court, rather than alternatives that were concocted for the first time on appeal. *See, e.g., Schwartz v. S.S. Nassau*, 345 F.2d 465, 466 (2d Cir.), *cert. denied*, 382 U.S. 919 (1965).

song either through the ASCAP or BMI per use license at the standard rate or directly from the copyright owner at a negotiated fee; and (3) the standard per use rates would be adjusted periodically to reflect prices reached in direct licensing transactions. 400 F. Supp. at 747 n.7.

If it had the alternatives of using a particular song at the standard per use rate or taking a direct license from the copyright owner, CBS witness Donald Sipes testified that CBS would take a direct license *only* when it could get the song for a fee that was lower than the standard per use rate: "[T]he only reason I would go to a copyright proprietor would be to attempt to get a lower price than under the schedule." (3 JA 198.) If CBS could not get a direct license for less, it could use the song without the owner's direct permission by simply paying the per use rate. (3 JA 197-99; 4 JA 334-38; 16 JA 4770.)

The standard per use rate would therefore place an artificial ceiling on the price that could be negotiated by the copyright owner for a direct license.[23] Rather than permitting a copyright owner to negotiate with CBS in a free market by competing against other copyright owners, the per use system, because it involves two separate prices for the same music, would necessarily force the owner to compete against himself.

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23. This ceiling effect would not be eliminated by the purported right of a copyright owner to "withdraw" a composition from the per-use reservoir." 400 F. Supp. at 747 n.7. The copyright owner would have that right only at certain intervals; he would rarely know, in time to withdraw and negotiate a direct license, that a program producer was interested in using his composition; and any attempt to withdraw would be meaningless if CBS went ahead and put the music "in the can" before the withdrawal became effective. Withdrawal would also be ineffective if CBS made a later "spontaneous or other unplanned" use of a withdrawn work. *Id.*

As long as any comparable work remained in the "reservoir," no owner of a work outside the "reservoir" could expect to be paid more than the per use rate. Indeed, CBS indicated at trial that withdrawal would be a signal that an owner sought prices higher than per use prices and that CBS and its producers would therefore eliminate withdrawn works from consideration for network use. (3 JA 122; 4 JA 365, 428, 605; 5 JA 679-99.)

If all this were not departure enough from actual competitive conditions, CBS' per use scheme further contemplates that the district court adjust the per use rates periodically in order to "reflect prices negotiated in direct licensing transactions." 400 F. Supp. at 747 n.7. Thus, after using a ceiling rate to drive down direct license prices, CBS would periodically be enabled to lower the ceiling to the direct-license level and begin the whole process anew. See the extended discussion of the operation of the per use scheme CBS proposed below in BMI's Post-Trial Brief, 2 JA 524-50.

The per use scheme CBS presented at trial can only be viewed as an outrageous attempt by the largest and most powerful buyer of music in the world to impose anticompetitive restrictions upon individual copyright owners.[24]

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24. Issue 5 of the Court's Scheduling Order asked whether, if the blanket license were now held to be illegal under the rule of reason, it would be "equally illegal" for the affiliates of BMI to "authorize [BMI] to issue licenses for individual compositions based on prices determined by the copyright owners?" Scheduling Order at 3610. We assume that under the system posited, BMI would act as a broker or agent, a role differing from its present role in that the copyright owner would retain the decision on prices to be charged by BMI. To us, such a system is essentially no different in terms of its legality from the direct licensing alternative presently available to CBS.

In our view, however, if a middleman is required efficiently to handle direct licensing transactions, it should be the market which decides who is to play that role, not the courts. *See* 400 F. Supp. at 763.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT CBS FAILED TO PROVE THAT BMI'S AFFILIATES HAVE MISUSED THEIR COPYRIGHTS.

On CBS' previous appeal, this Court, in a brief conclusory footnote, reversed the district court's decision that CBS had failed to establish copyright misuse, holding that, since the offering of blanket licenses to television networks was *per se* unlawful price fixing, CBS was entitled to a declaratory judgment of misuse. 562 F.2d at 141 n.29. Presumably that conclusion, tied as it was so directly to the *per se* holding, should have no continuing vitality, even if somehow a rule of reason violation were to be found. For the reasons set forth below, we urge the Court to so hold.

The antitrust-related misuse doctrine which was developed in the patent field should not be applied to copyrighted music. Misuse is a drastic remedy, causing the owner of the patent to forfeit his right to enforce the patent against anyone, even those users who were not affected by the misuse.

Ordinarily, an antitrust violation may not be asserted to defeat a contractual or property right. For example, a defendant sued for goods sold and delivered, or for that matter any other breach of contract, may not escape his obligation to pay by asserting that the plaintiff is guilty of an antitrust violation. *See, e.g., Kelly* v. *Kosuga*, 358 U.S. 516 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947).

Allowing a defendant (such as a copyright infringer) to escape liability by charging plaintiffs with antitrust violations is draconian and quixotic, bears no necessary relation to the offense and permits a wrongdoer to go free. As the Supreme Court said in *Bruce's Juices, supra*, an antitrust defense could

> "be justified only if it would be at least a rational, non-discriminatory and appropriate means of making the policy of the statute effective. To allow a buyer to get his goods for nothing . . . does not meet this test."

330 U.S. at 752-53. This rule against permitting a defendant wrongdoer to escape by charging the plaintiff with an antitrust offense extends even to suits where the plaintiff's complaint is of an antitrust violation. *See, e.g., Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134 (1968).

The only exception to this rule which the Supreme Court has recognized is in the patent field. The exception originated in *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488 (1942), where the Supreme Court recognized a misuse defense in a suit by the owner of a patent on a machine for dispensing salt tablets who had tied the sale of salt tablets to the leasing of the machine. This defense meant that the patent owner who was guilty of misuse could not enforce his patent even against an infringer who was not a target of the misuse. While the Supreme Court discussed the patent owner's conduct as contravening patent policy, the conduct had antitrust implications as well. In subsequent cases, the misuse doctrine has been employed wherever any antitrust violation by the patent holder has been found; analysis of patent policy as such has not been found necessary. *See, e.g., In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Carter-Wallace, Inc.* v. *United States*, 449 F.2d 1374 (Ct. Cl. 1971).

There are a few lower court cases on the question of whether there is a copyright misuse defense,[25] but none can

25. Courts have differed on the question whether any copyright misuse defense exists. For cases stating that copyright misuse is not a defense, *see Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd per curiam sub nom. Leo Feist, Inc.* v. *Lew Tendler Tavern, Inc.*, 267 F.2d 494 (3d Cir. 1959); *Buck* v. *Cecere*, 45 F. Supp. 441 (W.D.N.Y. 1942); *Society of European Stage Authors & Composers, Inc.* v. *WCAU Broadcasting Co.*, 35 F. Supp. 460 (E.D. Pa. 1940); *Buck* v. *Spanish Gables, Inc.*, 26 F. Supp. 36 (D. Mass. 1938); *Buck* v. *Newsreel, Inc.*, 25 F. Supp. 787 (D. Mass. 1938); *M. Witmark & Sons* v. *Pastime Amusement Co.*, 298 F. 470 (E.D.S.C.), *aff'd*, 2 F.2d 1020 (4th Cir. 1924); *Harms* v. *Cohen* , 279 F. 276 (E.D. Pa. 1922). *See also Foreign Car Parts, Inc.* v. *Auto World, Inc.*, 336 F. Supp. 977, 979 (M.D. Pa. 1973) ("doubtful" that there is such a defense); *United Artists*

[Footnote Continued]

be said to have resolved the issue. In *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.*, 191 F.2d 99 (2d Cir. 1951), this Court recognized the competing policies at issue but did not affirmatively resolve the question, choosing instead to apply a balancing test and ruling in favor of the copyright owner. *Id.* at 105-06.[26]

We submit that this Court should weigh the competing policies recognized in *Alfred Bell* and rule, for the reasons set forth below, that, while the "far-reaching social and economic consequences of a patent," *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945), may justify the patent misuse doctrine, no sound policy basis exists for extension of the doctrine to the vastly different copyright field. *See Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 343 (1971).

The leading patents are of overwhelming economic importance, supporting entire industries and hundreds of millions of dollars of capital investment. Access to a whole field of endeavor may be impossible without the right to practice one or more key patents. Misconduct by the holder of grants such as these can have substantial impact on the economy.[27]

Associated, Inc. v. *NWL Corp.*, 198 F. Supp. 953, 958 (S.D.N.Y. 1961) ("substantial question" whether there is such a defense).

For cases stating that copyright misuse would be a defense, *see Greenbie* v. *Noble*, 151 F. Supp. 45 (S.D.N.Y. 1957); *Columbia Pictures Corp.* v. *Coomer* , 99 F. Supp. 481 (E.D. Ky. 1951); *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed per curiam sub nom. M. Witmark & Sons* v. *Berger Amusement Co.*, 177 F.2d 515 (8th Cir. 1949).

26. *See generally* Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe*, 23 ASCAP Copyright L. Symp. 31 (1977); Fine, *Misuse and Antitrust Defenses to Copyright Infringement Actions*, 17 Hastings L.J. 315 (1965); Nicoson, *Misuse of the Misuse Doctrine in Infringement Suits*, 9 U.C.L.A. L. Rev. 76 (1962); Note, *The Misuse Defense in Copyright Actions*, 37 N.Y.U. L. Rev. 916 (1962).

27. The relative ease with which a copyright may be obtained and the longer period of a copyright's duration reflect Congress' recognition of the differing economic impact of patents and copyrights. *Compare L. Batlin & Son* v. *Snyder*, 536 F.2d 486, 490 (2d Cir.) (*en banc*), *cert.*

[Footnote Continued]

Issuance of a copyright for a musical work has no such effect. The owner of a copyrighted song cannot exercise control over any market. Even the most original and outstanding song may be replaced by many other songs under copyright or in the public domain. Any composer is free to create a new song on the same subject matter or a song that is otherwise suitable for the uses planned. No copyrighted song has any exclusionary effect on anyone in the business of creating or performing music.

Furthermore, there is generally a vast difference in what is at stake in patent and copyright infringement suits. Patent infringement suits often involve many millions of dollars; the typical musical copyright claim is likely to involve less than one thousand dollars. If misuse defenses are permitted, every copyright infringement action can be transformed into an expensive antitrust case, dwarfing the value of the typical copyright action. To further expand the "very strange class of private attorneys general," *Kelly* v. *Kosuga*, *supra,* 358 U.S. at 520 (1959), to include deliberate infringers of copyrights is to threaten destruction of the system of copyright protection Congress has created.

Even if this Court were unwilling to conclude that a misuse doctrine should never be recognized in a copyright action, it should refuse to apply the doctrine in the circumstances of this rule of reason case where, by definition, the conduct involved could not be as pernicious or offensive as in a *per se* antitrust case. All that composers and publishers have done is to seek to market their works in the historically accepted manner. Neither the copyright laws, nor the Department of Justice's consent decrees, nor any prior judicial decision had given them any warning that all or any part of the value of their works was subject to forfeiture because of their dealings with BMI and ASCAP. Indeed, each of these authorities indicated that bulk licensing by defendants was a lawful and proper practice.

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denied, 429 U.S. 857 (1976) and 17 U.S.C. §§ 102, 302 *with* 35 U.S.C. §§ 101-03, 154.

A misuse ruling threatens the livelihoods of the members of an entire profession. It jeopardizes the rights of the 70,000 writers and publishers who are affiliated with BMI or members of ASCAP, and of the thousands of writers associated with foreign performing rights organizations whose works are made available in this country through BMI and ASCAP. It imperils not just their income from the performing rights licensed through BMI and ASCAP, but as well their income from sheet music, synchronization rights, mechanical rights for records and tapes, dramatic rights and performing rights for motion pictures.

CONCLUSION

CBS had its day in the trial court and failed there to carry the burden of proof. It then had its day in this Court and failed to persuade the panel here that the findings of the court below were clearly erroneous. It subsequently had its day in the Supreme Court where it failed to persuade the eight-member majority that there is anything illegal about the music licensing practices of BMI and ASCAP. And now, it has failed once again in this Court to advance any basis for upsetting the carefully reasoned conclusion of the court below that BMI and its affiliates have not violated the antitrust laws or the policy of the copyright laws.

For all of the reasons set forth above, the order appealed from should be affirmed in all respects.

Dated: New York, New York
October 25, 1979

Respectfully submitted,

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STATE OF NEW YORK)
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AFFIDAVIT
OF SERVICE

MATTHEW F. EIGO, being duly sworn, deposes and says that he resides at 78 Prospect Park West, Brooklyn, N.Y. 11215

; that on the 25th day of October, 1979, he served the within BRIEF OF DEFENDANTS-APPELLEES BROADCAST MUSIC, INC., et al.

on the attorney for the Antitrust Division, Department of Justice herein by mailing ~~a~~ three copies true ~~copy~~ thereof, securely enclosed in a post-paid, properly addressed wrapper, in the ~~mail~~ post office ~~box~~ under the exclusive care and custody of the United States Postal Service at the corner of ~~Wall~~ Pine Street and ~~Broadway~~ Pearl Street, New York, New York, addressed to said attorney as follows:

John J. Powers, III, Esq.
Assitant Chief
Appellate Section
Antitrust Division
Department of Justice
Washington, D.C. 20530

The above address has appeared on the prior papers in this action as the office address of said attorney.

Deponent is over the age of 18 years and not a party to this action.

Matthew F. Eigo

Sworn to before me this
25th day of October, 1979.

Michael J. Lonergan
Notary Public

MICHAEL J. LONERGAN
Notary Public, State of New York
No. 50-4679920
Qualified in Westchester County
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